

Procedural Matters

4. There were two preliminary hearings in this case. The first, for case management, took place before Regional Employment Judge Potter on 20 February 2019. On that occasion the issues were agreed and, among other matters, an amendment was not made to the name of the Second Respondent, a matter to which further reference will be made later in these reasons. A further preliminary hearing took place on 9 September 2019 at which Employment Judge Burns refused the Respondents' applications for orders striking out the complaints or for deposit orders.

The Issues

5. There was an agreed list of issues, a copy of which is attached as an annex to these reasons. The following issue was added by amendment:

Was the Claimant in employment with Respondent One within the meaning of s.83 of the Equality Act 2010?

6. Mr McKetty confirmed that, so far as the complaint of harassment was concerned, the only act relied on was the Claimant's dismissal on 8 June 2018. This meant, as Mr Malik conceded in final submissions, that there was no issue as to time limits in relation to the complaint against the Second Respondent.

Applications to amend the responses

7. Both Respondents applied to amend their responses with a view to arguing that the Claimant was not in employment within the meaning of s.83(2) of the Equality Act and therefore could not maintain her claims under that Act against either Respondent.

8. In paragraph one of its particulars of response the Second Respondent pleaded as follows:

"The Second Respondent respectfully submits that the Claimant was not an employee or worker for the purposes of s.83 Equality Act 2010. The Second Respondent submits the Tribunal does not have jurisdiction to hear the Claimant's claims against the Second Respondent. The Second Respondent respectfully requests that the Claimant's claims against them are dismissed on the basis that the Tribunal does not have jurisdiction to hear them".

9. In the list of issues this point was recorded in the following way:

1.1 Whether the Claimant was in employment with the Respondent Two within the meaning of s.83(1) Equality Act 2010; if not

- 1.2 Does she have legal standing to pursue a claim against Respondent Two; if not
- 1.3 Should the allegations against Respondent Two be dismissed?

10. The Respondents now sought to argue a somewhat different point, or a variation of that point, namely that the Claimant was not in employment with the First Respondent, such that the complaints could not be maintained against either Respondent. (The complaints against the Second Respondent were put on the basis that the Claimant was a contract worker within the meaning of s.41 of the Equality Act and it would be an essential element for this that she was in employment with the First Respondent).

11. The First Respondent had not taken this point in its response in its “grounds to resist” document, where the First Respondent used the terms “employment” and “contract of service” with reference to the Claimant. In its application the First Respondent sought to amend the latter to a reference to “contract for services”.

12. The Second Respondent’s application was notified on 17 September 2019 and the First Respondent’s on 2 October 2019. Ms Amin accepted that the First Respondent had only taken up the point after the Second Respondent had raised it.

13. Mr McKetty submitted that the point had been effectively decided by Employment Judge Burns at the preliminary hearing. On this point the Tribunal found that, although it was possible to discern from the reasons that Employment Judge Burns gave for his decision that he was unimpressed by the argument, he had not decided it. His refusal to strike out the claim did not amount to a finding on the merits of this point, or any point, in the Claimant’s favour. Mr McKetty also argued that there was no merit in the point and that it was unreasonable for the Respondents to raise it especially at this stage. He stated, however, that he would not seek an adjournment if the amendments were allowed.

14. The Tribunal allowed the applications. The Second Respondent had put the Claimant’s status in issue in its original pleading, albeit the point recorded in the list of issues was more restricted. The Tribunal considered that it would not be just to prevent the Second Respondent relying on a point that it had pleaded, at least to a certain extent. It would then be artificial to hold that the Second Respondent but not the First Respondent could rely on this argument, which concerned the Claimant’s status with regard to the First Respondent. There was no evidential prejudice to the Claimant and the hearing could continue.

Early Conciliation Certificate

15. Another procedural point concerned the early conciliation certificate relevant to the Second Respondent. This named the prospective Respondent as “Harrods” and gave the address of that department store. In the claim form

the Claimant named the Second Respondent as “Harrods (Clive Christian)” and gave the Second Respondent’s business address.

16. Mr Malik, while not pressing the point with any great vigour, submitted that there was therefore no early conciliation certificate naming the Second Respondent. The Tribunal found that this aspect had been addressed by the amendment to the Second Respondent’s name made at the preliminary hearing on 20 February 2019. It did not appear that any dispute had been raised at that point. The Second Respondent’s name had been amended and there had been no challenge to that order, whether by reference to the early conciliation certificate or any other matter. The Tribunal found that it was not open to the Second Respondent to take a point about this at this stage.

Evidence and Findings of Fact

17. The Tribunal heard evidence from the Claimant on her own behalf. Evidence was given on behalf of the Second Respondent by Ms Jessica Wilson, a former Sales Director, and Mr Tate Torongo, Sales and Education Manager. On behalf of the First Respondent evidence was given by Ms Helen Parker-Herman, Senior Business Manager; Ms Alison Winchester, Operations Manager; and Ms Sally Wood, Associate Business Partner. The Tribunal also read the witness statement of Ms Holly Cadbury, who was unable to attend the hearing.

18. There was an agreed bundle of documents and page numbers in these reasons refer to that bundle.

The Claimant’s Status

19. The First Respondent is an agency that supplies individuals on a temporary basis to its clients, including the Second Respondent, who sell beauty products in retail outlets. The Second Respondent has a counter in the Harrods department store.

20. The issue brought before the Tribunal by way of the amendments to the responses concerns the Claimant’s status with regard to s.83 of the Equality Act. It is convenient to deal with the evidence and the Tribunal’s findings on this issue as a whole at this stage.

21. Section 83 of the Equality Act includes the following provision

(2) “*employment*” means –

(a) *employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*”

22. Mr Malik referred the Tribunal to several authorities in support of his submissions. In **Hashwani v Jivraj [2011] ICR 1004** the Supreme Court considered the position of an arbitrator with regard to the then current legislation about discrimination on grounds of religion or belief. In paragraph

23 of his judgment Lord Clarke, with whom the majority of the Supreme Court agreed, said that the question in issue was whether the contract appointing the arbitrator provided for “employment under ... a contract personally to do any work”. Lord Clarke then said this:

“There is in my opinion some significance in the fact that the definition does not simply refer to a contract to do work but to “employment under” such a contract. I would answer the question in the negative on the ground that the role of an arbitrator is not naturally described as employment under a contract to personally do work. That is because his role is not naturally described as one of employment at all. I appreciate that there is an element of circularity in that approach, but the definition is of “employment” and this approach is consistent with the decided cases”.

23. Lord Clarke then referred to the earlier cases of **Percy [2006] ICR 134** and **Allenby [2004] ICR 1328** and said that the essential questions in each case were:

“... whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of service who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case, they depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case”.

24. In **Halawi v WDFG UK Ltd [2015] 1CMLR 31** the Court of Appeal considered the status of a beauty consultant who worked at a duty-free outlet at an airport. Some features of the arrangement under which the Claimant worked were that she provided her services to a cosmetic company through a limited company which she had established herself and the cosmetic company then entered into an agreement with the managers of the duty free outlet (the Respondent to the claim); the Claimant had to seek the Respondent’s permission to take holiday and the Respondent had the power to issue a warning if she was late for work; there was no entitlement to sick pay or holiday pay; there was no contract of employment; the Claimant did not have to perform the duties personally but could send a substitute; there was no obligation to provide her with work and the Respondent did not have control over her beyond the control that it exercised over the workplace.

25. In giving the judgment of the Court Arden LJ stated at paragraph 4 that:

“the criteria include a requirement that the putative employee should agree personally to perform services, and a requirement that the

putative employee should be subordinate to the employer, that is, generally be bound to act on the employer's instructions. In determining whether the relationship is one of employment the court must look at the substance of the situation".

26. In paragraph 28 Arden LJ stated that key factors were the element of subordination and the receipt of remuneration.

27. In **Windle v Secretary of State for Justice [2016] ICR 721** the Court of Appeal held that the absence of mutuality of obligation in terms of a contract covering the situation between assignments, in other words a form of umbrella contract, could be a relevant factor for the Tribunal's consideration, depending on the particular facts. In that particular case, the Employment Tribunal had not erred by treating this as a relevant factor, and finding that the Claimant was not an employee for the purposes of s.83 of the Equality Act.

28. Mr McKetty made some submissions directed to the Agency Workers Regulations 2010. The Tribunal concluded that ultimately these Regulations were not relevant to the issue at hand. Regulation 5.1 provides that an agency worker shall be entitled to the same basic working and employment conditions as they would be entitled to for doing the same job had they been recruited by the hirer, and regulation 6.1 provides that the relevant terms and conditions in regulation 5 means terms and conditions relating to pay, the duration of working time, night work etc. The Tribunal did not find these Regulations of any assistance in determining the question arising under the Equality Act.

29. The evidence about the Claimant's status was as follows. She was engaged by the First Respondent under its standard terms, which are headed "conditions of work (temporary sales consultants)" at pages 63-64. Some of the features of this contract were the following:

- (1) It stated that "Temporary sales consultants are engaged under a contract for services, the terms of which are set out below and which apply to each and every assignment. For the avoidance of doubt this contract for service is not a contract of employment."
- (2) It was stated that there was no obligation for the company to provide, Or for the consultant to serve, any normal number of days in a week.
- (3) It was provided that, where an assignment might be suitable for any number of temporary sales consultants, the First Respondent reserved the right to decide who to offer the assignment to.
- (4) There was a stated daily rate of pay, subject to the rider that rates might vary according to the particular store concerned. Pay was said to be subject to deductions for National Insurance and PAYE.

- (5) The First Respondent undertook to pay the consultant's wages in respect of work successfully completed whether or not the First Respondent was paid itself.
- (6) The consultant was entitled to paid annual leave according to the statutory holiday entitlement of 5.6 weeks per annum.
- (7) There was a requirement for a fully completed report sheet in respect of each assignment.
- (8) It was stated that the consultant was not obliged to accept any assignment offered but that if she did she was to be present during the times agreed and to take all reasonable steps to safeguard her own safety and the safety of other persons.
- (9) There then followed eleven numbered requirements including complying with the rules applicable to the premises where the services were performed, arriving in good time to be ready to start work and the given start time, adhering to the First Respondent's guidelines for dress code, appearance and grooming and other matters.
- (10) The contract referred to the Working Time Regulations and the limit of an average of 48 hours in any particular week.
- (11) The contract concluded with a declaration that the consultant had received the First Respondent's handbook.

30. In a separate document headed Consultant Criteria the First Respondent set out the requirements as to attire and discipline at work. These included punctuality and complying with in-store registration or check-in procedure. There was also at page 66 a form on which the consultant confirmed again that she had received the First Respondent's handbook and which contained a note as to the Agency Workers Directive.

31. The handbook contained matters such as the dress code and requirements as to appearance; time keeping; sickness absence; observing store rules and regulations and at page 86 under the heading "Equality", reference to the Equality Act 2010. This section stated that it was unlawful to discriminate against others at work with the relevant protected characteristics, and said that this could occur directly or indirectly and by harassment or victimisation. The section stated, "we want everyone to work in a positive environment, free from harassment or bullying, and where decisions are based on merit" and "discrimination will not be tolerated and action will be taken as appropriate to eliminate any such conduct".

32. So far as correspondence is concerned, in a letter of 6 June 2018 inviting the Claimant to a disciplinary meeting on 8 June Ms Parker-Herman included the observation that "the outcome of this meeting could lead to disciplinary action being taken against you which could lead to termination of

your employment". Different terminology was used in the outcome letter, also from Ms Parker-Herman, which said that the Claimant would be removed from the First Respondent's register, terminology that was repeated in Ms Wood's letter giving the outcome of the appeal.

33. Both Ms Parker-Herman and Ms Wood used the terms "contract of service" in their witness statements and, in answer to questions from Ms Amin, both said that they wished to change that to contract for services.

34. The Tribunal reminded itself that it should consider all the circumstances of the case and make a detailed consideration of the relationship between the parties.

35. The Tribunal found that there was no umbrella contract as there was no obligation on the First Respondent to offer assignments, nor on the Claimant to accept any that were offered. There was no doubt, however, that when the Claimant was working on an assignment she was working under a contract personally to do work.

36. The Tribunal considered that this was not a situation such as that applying to an arbitrator as discussed in Hashwani where one would not naturally describe the role as one of employment. Was there an element of subordination so that the Claimant should be regarded as working "under" such a contract? Although the conditions of work document stated that it was not a contract of employment it clearly had not occurred to the First Respondent until the matter was raised by the Second Respondent, even up to the point of drafting its witness statements, that there was a point to be taken to the effect that the Claimant was not employed under a contract personally to do work. Ms Wood's statement in her oral evidence that the consultants were not self-employed perhaps indicated a similar mind set.

37. The Tribunal found that there was indeed subordination to the First Respondent when a consultant was working at a retail store. As set out above, there were extensive obligations on the consultant, including as to dress code and appearance, time keeping, and observing store rules. The provisions as to holiday pay and the working time regulations were also consistent with the notion of employment as opposed to self-employment, as was the deduction of PAYE and to National Insurance contributions. The Tribunal also found that the reference in the handbook to the Equality Act was significant in the present context. The Tribunal concluded that this reference was not there as a statement of general information, but was intended to convey that the Equality Act provisions applied to the working relationship, whether in terms of something that the consultant was expected to observe, or something that she was entitled to expect to be observed in relation to her. If it was intended that the relationship should be one to which the Equality Act did not apply one would not expect it to appear in this way in the handbook.

38. The Tribunal therefore concluded that the Claimant was, while working at Harrods on the occasions that are material to this case, employed by the First Respondent under a contract personally to do work.

The Substantive Complaints

39. The Claimant began work under the agreement with the First Respondent on 17 November 2017. The work that she carried out was at the Second Respondent's counter in Harrods where she wore the Second Respondent's uniform and name badge.

40. On 11 May 2018 the Claimant arrived some number of minutes late. Her account was that this was five minutes, although the Second Respondent's employee identified as Diana had suggested more than that. The precise number is not important for the issues that the Tribunal has to decide. The Claimant's evidence was that as the day went on Diana kept speaking to her in a rude and derogatory manner. The Claimant called the First Respondent several times about this and spoke to Ms Cadbury.

41. The Claimant continued that at about 3pm Diana spoke to her in a raised voice in front of customers and colleagues and that she replied, also in a raised voice. The Claimant then left Harrods and telephoned the First Respondent to report what had happened.

42. There was some difference between the Claimant and the First Respondent's witnesses about the precise sequence of conversations. The Claimant's evidence was that she spoke to Ms Cadbury at this stage and to Ms Winchester later. Ms Winchester's evidence was that she, rather than Ms Cadbury took this call from the Claimant when she left the store. Again, it is not material to the issues before the Tribunal to decide this particular point, as it was common ground that at some stage on 11 May Ms Winchester spoke to the Claimant about the incident. For the Tribunal's purposes, the relevant points to emerge from this conversation are that Ms Winchester was made aware that the Claimant and Diana had spoken to each other sufficiently loudly to attract the attention of others nearby, and that Ms Winchester felt that the incident had been dealt with at that point. There was also discussion at some stage, whether between the Claimant and Ms Cadbury or the Claimant and Ms Winchester, about whether the Claimant should return to work at Harrods, and it was agreed that she should.

43. The Claimant then continued to work on the Second Respondent's counter. On 16 May 2018 there took place a conversation between the Claimant and an employee of the Second Respondent named Aida. The Claimant's evidence was that Aida told her that Diana had made inappropriate comments about Mr Torongo, who was at the time the new area manager.

44. In paragraph 24 of her witness statement the Claimant said that Aida told her that Diana had said that she could not believe that the Second Respondent had employed someone who was black and unattractive with no teeth in his mouth, and that his last employer had not paid him enough to have his teeth fixed. The Claimant used essentially the same words in her subsequent written grievance at page 116. In the grievance investigation

meeting the words used by the Claimant in stating what Aida had said were “African, black, ugly, no teeth in his mouth”.

45. In her oral evidence the Claimant said that what she said at the meeting was the correct version of what Aida had said to her, and that the latter had used the word “African” and had said “ugly” rather than “unattractive”. Her explanation for the difference was that she could not bring herself to write the words African or ugly. On about 8 June the Claimant spoke to a colleague named Stuart (also a consultant engaged by the First Respondent) who she understood had overheard the conversation between Aida and Diana. (In order to get in touch with Stuart the Claimant told Ms Cadbury that she had found something of his in the store, which was not true. This, however, caused Stuart to phone the Claimant, giving her the opportunity to ask him about what he had overheard). At the investigation meeting (page 134) the Claimant said that Stuart could only confirm that Diana used the word “black”.

46. On 6 June Ms Winchester spoke to Stuart and recorded what he said in an email to Ms Parker-Herman at page 141 in the following terms:

“They were trying to figure out who the new Clive Christian area manager is, Diana said “do you know who Tate is the new area manager ... Aida said what did he look like? Diana replied black with gap in his teeth”

Ms Winchester asked whether this was a racially motivated conversation and Stuart replied, “no not at all, they were not sure if it was the same person and they was just trying to establish who he was”.

47. It was not necessary for the Tribunal to attempt to decide what Diana had said to Aida. However, we found that the Claimant was essentially correct about what Aida said to her. We found, as a matter of probability, that Aida did say that Diana referred to Mr Torongo in a derogatory way, including reference to his colour. We did not find that the differences in the Claimant’s account (i.e. whether or not the word African was used and whether Aida said ugly or unattractive) were of great significance; the Claimant’s account remained essentially consistent. It is true that there was a delay from 16 May when the conversation took place until 4 June when the Claimant sent a grievance (as to which see below). The Tribunal did not find that this raised significant doubt as to the essentials of what Aida had said to the Claimant. The Claimant’s explanation for the delay was that she wished to speak to Mr Torongo about the matter before taking it any further. We found it plausible that she would want to do so, as the comment was about him.

48. There was then a conversation between the Claimant and Mr Torongo in which the former told him what Aida had said that Diana had said about him. Mr Torongo’s recollection was that this took place on the Friday before the Claimant sent her grievance, which would put it on 1 June 2018. He said that although he went to the store as a rule about twice a week during this time he was absent for a period, which led the Tribunal to conclude that it was quite

possible that 1 June was the first opportunity that the Claimant had to speak to him.

49. The Claimant and Mr Torongo agreed that the latter said words to the effect that he was not offended by what he was being told. In his oral evidence Mr Torongo explained that this did not mean that he thought that such comments were acceptable. He took the view that they had not been substantiated, and he felt that one of the purposes of the conversation was that the Claimant was trying, as he put it, “to rile me up”, and that he was aware that neither Aida nor the Claimant got on well with Diana.

50. The Claimant told Mr Torongo that she was offended by what had been said and that she intended to take it further. There was a difference between them as to precisely what Mr Torongo said to that. The Claimant’s account was that he said that she should complain directly to Ms Wilson and that he gave her Ms Wilson’s business card with her contact details. Mr Torongo’s account was that he said that the Claimant could go to Ms Wilson, but that she should speak to her agency first. In his oral evidence Mr Torongo stated that he said this because the Second Respondent only had responsibility for the Claimant’s work output, giving as examples instructions to serve a particular customer or to put something through the till.

51. The Tribunal preferred Mr Torongo’s evidence on this point. We found it more likely that he would have said that the Claimant should go to her agency first rather than simply directing her to Ms Wilson without more. As subsequent events in this case have shown, there was a clear potential for difficulties to arise if the Claimant took her complaint to the Second Respondent without first referring to the First Respondent.

52. On 4 June 2018 the Claimant sent to Ms Wilson, copied to Mr Torongo, a letter at page 116. This began with the words;

“I am writing this letter to bring to your attention what I deemed to be gross misconduct within the work place”

In the letter the Claimant wrote that she had had a conversation with Aida and

“She then told me that Diana said, ‘I can’t believe Clive Christian employed someone who is black, unattractive and has no teeth in his mouth’ I was then told by Aida that Diana made another disgraceful comment, expressing her disillusion that his previous employers had not paid him enough to “get his teeth fixed”.’

The Claimant said that these comments were overheard by Stuart. She referred to her meeting with Mr Torongo and to the fact that he said he did not take the matter to heart. The Claimant said that she was appalled by what was said and that she took grave offence to these comments. She concluded giving Stuart’s phone number.

53. Also on 4 June 2018 Ms Wilson forwarded the Claimant's letter to Ms Cadbury. She said that if the Claimant wanted to raise a formal grievance this should be with the First Respondent, but she added that she would like to speak to the Claimant for an informal discussion. She asked to be informed of the process that would be undertaken. Ms Cadbury replied to Ms Wilson on 5 June 2018 at page 119 apologising for the fact that this had been sent directly to her, and saying that there would be an investigation meeting. She said that they would also need to speak to Stuart to confirm whether he was happy for his details to be shared in this way. She concluded "I will get back to you as soon as possible regarding this matter and I sincerely apologise for any disruption this may have caused".

54. Ms Wilson replied to Ms Cadbury also on 5 June in somewhat different terms from her original communication about the grievance, saying this;

"This is a very serious matter – Tate Torongo manages our Harrods team and this communication should never have been sent to me, let alone Tate. I hope you can understand the gravitas of this situation being raised directly with us and also the content of it – therefore we need your support for the investigation to occur asap, I believe any grievance needs to be raised with BCB – and this is not the first time your team has contacted us directly with a grievance"

55. Meanwhile, also on 4 June 2018 a consultant named Zoe sent Ms Cadbury an email describing an incident involving Aida. The Claimant's case was that it was suspicious that this matter had come to light when it did, in the sense that she suggested that the First Respondent was seeking some means of discrediting Aida. It is important to look at the precise sequence of events affecting this matter. The Claimant sent her letter of complaint to Ms Wilson at 16:17 on 4 June. Ms Wilson sent it on to Ms Cadbury at 17:49. In an email at page 118 sent to Zoe at 13:50 on 4 June Ms Cadbury referred to having spoken to her that morning about Aida and asked her to put something in writing about what had happened, Zoe then did so in an email timed at 21:55 on 4 June. It is therefore the case that, although Zoe's email was sent after Ms Cadbury had been made aware of the Claimant's grievance, Ms Cadbury had spoken to Zoe about the matter and had sent the email asking for something in writing before the Claimant had sent her grievance to Ms Wilson or Ms Wilson had sent in on to Ms Cadbury.

56. Faced with this chronology, Mr McKetty submitted that Mr Torongo had heard about Aida's comment on 1 June and that the Respondents might therefore have been "getting reading for a complaint by the Claimant". The Tribunal found no evidential basis for this idea, which in any event was not put to any of the witnesses. We found it improbable that the First Respondent would seek to generate allegations against Aida in order to contend with an anticipated complaint by the Claimant which had not even been made at that point.

57. A meeting to investigate the Claimant's grievance took place on 5 June 2018 chaired by Ms Parker-Herman with Ms Winchester taking notes. The

Tribunal has already set out what the Claimant said about what Aida had told her. Further points covered in the meeting were that the Claimant said that Aida did not want to complain as she did not handle pressure well. She said that she had Stuart's permission to give his contact details to the Second Respondent, and referred to her conversation with Mr Torongo. Ms Parker-Herman said that she was concerned that this was "third party gossip" and the people concerned worked for the Second Respondent.

58. In the notes on page 136 it is recorded that Ms Parker-Herman said that the Claimant should have come to the First Respondent as per the instructions in the handbook. The Claimant said she was going to contact the First Respondent and Harrods' HR. She then went on to raise the incident between her and Diana on 11 May. The Claimant said that everyone there turned around and was looking. Ms Parker-Herman asked, "Oh were you shouting on the shop floor?" to which the Claimant replied, "I am amazing at my job, people came over to check I was ok". Ms Parker-Herman then said it was unacceptable to raise one's voice on the shop floor. The Claimant said that she had then worked in Harrods without any issues. After a break Ms Parker-Herman said that the Claimant should not return to Harrods, but she would be paid at the same rate at whatever shift she was put on to.

59. As previously recorded, on 6 June 2018 Ms Parker-Herman sent a letter to the Claimant inviting her to a disciplinary meeting on 8 June. The matters concerned were raising her voice on the shop floor at Harrods and leaving a booking as she felt unfairly treated; and raising a grievance with the client (i.e. the Second Respondent). Ms Parker-Herman said that she had investigated the allegation and had been unable to find any evidence to support what the Claimant said. She said that she had contacted Stuart and that he did not support the Claimant's version of events.

60. Another matter arose on 7 June 2018. On 6 June the Claimant had been assigned to a client operating at a store in White City. On 7 June an administrator for the Estee Lauder group sent an email to the First Respondent's business manager named Ruby, making a complaint to the effect that the Claimant had encouraged customers looking at products on one counter to go and consider the products that she was selling instead. The administrator asked that the Claimant should not be put forward for that location again. Later that day Ruby replied that Ms Winchester had spoken to the Claimant about this and "I can assure you she will not be covering any Lauder shifts".

61. In a similar way to his contention about the communication from Zoe, Mr McKetty submitted that this complaint against the Claimant had been "drummed up" in response to her grievance. The Tribunal found this contention to be implausible. It involved the suggestion that, in order to generate material that would justify terminating the Claimant's contract, the First Respondent would approach valued clients and ask them to invent allegations against the Claimant. We found it unlikely that the First Respondent would do that, not least because it would involve a clear risk of damaging the business relationship with the client. It was in the Tribunals

judgment even more unlikely that the client would go along with such a proposal and invent a complaint, or go in search if something about which it could complain.

62. The disciplinary meeting took place on 8 June 2018 chaired by Ms Parker-Herman, there being notes of this at pages 147-156. Some matters recorded were as follows. Ms Parker-Herman said that the Claimant had not sent her grievance to the correct person and that in going straight to the client she failed to follow procedure. On page 150 there was reference to the way in which the Claimant had obtained Stuart's phone number and on page 151 to the Claimant passing that number on to Ms Wilson. On page 152 Ms Parker-Herman referred to the incident on 11 May when the Claimant and Diana spoke in raised voices.

63. On page 153 the Claimant questioned why it was unreasonable for her to make a complaint about race discrimination and body shaming, and said that the focus should be on taking complaints about racist comments seriously rather than on the other matters which were said to reflect on the reputation of the company. On page 154 the Claimant referred to what Stuart had said, and said that in contrast she was not afraid to stand up to racism. At this point Ms Winchester was called into the meeting and she said that Stewart had simply said what he heard and witnessed. On page 155 the Claimant asserted that Mr Torongo had given her the go ahead to send an email to Ms Wilson, and then added that the current disciplinary meeting was in itself discriminatory and an act of victimisation.

64. The meeting ended with Ms Parker-Herman stating that the Claimant would be removed from the register with immediate effect because of a breach of trust and the fact that it could not be guaranteed that she would act in the business's best interests in the future. She then added that the Claimant could not be given a Lauder booking on the day previously as there had been a complaint from Lauder. Finally, Ms Parker-Herman said that the Claimant had the right to appeal.

65. On 11 June 2018 Ms Parker-Herman sent to the Claimant at pages 157-159 an outcome letter in respect of the disciplinary meeting. This recorded that the Claimant had not followed the correct procedure in sending her grievance to Ms Wilson and stated that the first step should have been to contact one of the First Respondent's managers. The letter referred to the events on 11 May and said that raising one's voice on the shop floor was not acceptable conduct.

66. The letter continued that the Claimant had jeopardised her own reputation, the reputation of Diana, and the First Respondent's reputation by repeating a conversation to Mr Torongo and emailing Ms Wilson about it. Ms Parker-Herman wrote that no evidence had been found to support the Claimant's assertion that racial discrimination occurred in Harrods on the occasion she raised a complaint about. She referred to the comments made by Stuart. Ms Parker-Herman then recorded seven bullet points as the outcome of the meeting:

- you failed to follow procedure when reporting a complaint
- you conducted yourself in an inappropriate manner chatting on the shop floor and raising your voice on the shop floor while temping for BCB
- it was inappropriate for you to approach an area manager to repeat hearsay
- a serious breach of confidence as you gave another member of BCB's temporary staff a private telephone number to a client without his permission
- you brought the company's name into disrepute with your actions
- keeping you working for BCB would most likely be detrimental to our business
- the letter repeated that the Claimant would be removed from the First Respondent's register, and referred again to the right to appeal

67. The Claimant raised an appeal and on 16 July 2018 Ms Wood sent her a letter inviting her to an appeal meeting on 23 July. The Claimant replied saying that she would like to present her appeal in writing and Ms Wood said she would accept that. The Claimant then sent an appeal submission at page 166-167. In this she referred to the Equality Act, saying that she had reported what she considered to be racial discrimination towards another member of staff, and said that she had suffered victimisation as a result. She concluded that she had suffered direct discrimination, victimisation and harassment and said that she would be seeking legal advice and making a claim to the Employment Tribunal.

68. The Claimant did not attend the meeting set for 23 July and Ms Wood set a further date for 14 August. Again the Claimant did not attend and at this point Ms Wood took a decision in her absence. She communicated this in a letter of 15 August 2018 at pages 169-170. Ms Wood said that she was upholding the decision to remove the Claimant from the First Respondent's register and said that she found no evidence that discrimination occurred or that she had been victimised in any way. She said that the description of Mr Torongo as "black, with a gap in his teeth" was a description, not racism or discrimination.

69. Ms Wood repeated the seven bullet points relied on by Ms Parker-Herman and she said that on 11 May the Claimant had breached both Harrods' and the First Respondent's code of conduct in raising her voice in the vicinity of customers. She also said that raising the grievance with the client was not the correct procedure to follow and could have caused damage to the First Respondent's reputation. Ms Wood said that both the Second Respondent and Estee Lauder had complained about the Claimant and declined to have her on future bookings.

70. The Claimant then presented her claim to the Tribunal on 7 September 2018.

The Applicable Law and Conclusions

71. The main thrust of Mr McKetty's submissions on the substantive issues was in relation to the complaint of victimisation. The Tribunal considered that this was appropriate as it was victimisation that seemed the most obvious characterisation of the Claimant's complaints.

72. The Tribunal reminded itself of section 136 of the Equality Act 2010, which provides that:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

73. The Tribunal had section 136 in mind, but in the event found that it was able to make clear findings about the reason why the relevant matters occurred, in the way envisaged by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37.**

74. Section 27 of the Equality Act makes the following provisions about victimisation:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do a protected act

(2) Each of the following is a protected act –

(c) Making an allegation (whether or not expressed) that A or another person has contravened this Act

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

75. Ms Amin conceded that the Claimant's complaint about what she had been told Diana had said was an allegation of a contravention of the Act, a concession with which the Tribunal agreed.

76. Both Respondents contended that the allegation was false and made in bad faith within the meaning of sub-section 2 and did not therefore qualify as a protected act. Both elements have to be present for the provisions of sub-section 2 to apply, such that the issue of bad faith does not arise if the

allegation is true. Equally, an allegation that is false will still amount to a protected act if it is not made in bad faith.

77. Establishing the truth or falsity of the allegation about what Diana had said would be a difficult task given the absence of any evidence from anyone who was present when the original conversation took place. It was not, however, necessary for the Tribunal to resolve this issue since we were satisfied that the allegation was not made in bad faith. In **Saad v Southampton University Hospital NHS Trust UK EAT/0276/17** the Employment Appeal Tribunal stated that the focus of the enquiry should not be on the Claimant's motivation but on whether they had acted honestly in giving the evidence or information or in making the allegation. In paragraph 50 of the EAT's judgment HHJ Eady QC said this:

“When determining whether an employee has acted in bad faith for the purposes of sub-section 27(3) of the Equality Act, the primary question is thus whether they have acted honestly in giving the evidence or information or in making the allegation. As Burton J observed in **Fenton**, the issue is not the employee's purpose but their belief. I do not say that the existence of a collateral motive could never lead to a finding of bad faith – not least because it is impossible to foresee all scenarios that might arise – but the focus should be on the question whether the employee was honest when they gave the evidence or information or made the allegation in issue. In answering that question, the Employment Tribunal will already have established that the evidence, information or allegation was false. That does not mean the employee acted in bad faith, although it may be a relevant consideration in determining that question (the more obviously false the allegation, the more an Employment Tribunal might be inclined to find that it was made without honest belief). Similarly, the employee's motive in giving the evidence or information or in making the allegation may also be a relevant part of the context in which the Employment Tribunal assess bad faith. The Employment Tribunal might, for example, conclude that the employee dishonestly made a false allegation because they wanted to achieve some other result, or that they were wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because they had some collateral purpose in making it. Motivation can be part of the relevant context in which the Employment Tribunal assess bad faith, but the primary focus remains on the question of the employee's honesty”.

78. The Tribunal has already expressed its finding that the Claimant was essentially right about what she said that she had heard Aida say. The Tribunal found no reason for finding that the Claimant did not believe that Diana had said what Aida reported. It may have been that the Claimant was more willing to raise a complaint about what she had been told Diana had said than would have been the case had the report been about someone that she liked. The Tribunal found that this did not, however, mean that the allegation was made in bad faith; we found that the Claimant believed that it was true in that she believed that Diana had said the things that were reported. It follows

that even assuming that the allegation was false (in the sense of not being true) it was no made in bad faith.

79. The next element of the test for victimisation is whether there has been a detriment. The list of issues identified three detriments namely;

- (1) The Claimant's grievance was not reported by the First Respondent to the Second Respondent.
- (2) The First Respondent failed to properly investigate the grievance.
- (3) The First Respondent dismissed the Claimant.

80. In their submissions the parties focussed, naturally enough, on the dismissal as the detriment in issue. Ms Amin submitted that the dismissal was not a detriment, essentially because the First Respondent had the right to dismiss the Claimant. The Tribunal disagreed with this submission and found that a dismissal was a detriment, whatever the merits of the decision might be.

81. It was difficult to see how the First Respondent's failure to report the Claimant's grievance to the Second Respondent could amount to a detriment, given that the Claimant herself had reported the grievance directly to the Second Respondent. As to the way in which the First Respondent investigated the grievance, there were points to be made that might have assumed some importance had there been a complaint of unfair dismissal under s.98 of the Employment Rights Act (e.g. whether any alternatives to dismissal were considered and whether the Estee Lauder complaint played any part in the decision, and if so whether the Claimant had had a proper opportunity to address it). The Tribunal found it difficult to say that the First Respondent failed to properly investigate the grievance, but assumed for this part of the analysis that the way in which that was investigated could amount to a detriment.

82. The final question in this analysis is that of causation; was the Claimant subjected to a detriment or detriments because she had done a protected act? On this point, it was common ground that it is not necessary for the protected act to be the sole or principal reason for the detriment (whether dismissal or another detriment); it is sufficient if the protected act is a significant influence on the detriment.

83. When considering causation, there is a distinction to be drawn between the doing of a protected act and the manner in which the protected act is done. In **Martin v Devonshires Solicitors [2011] ICR 352** Underhill J stated that there were cases where the reason for the dismissal (or other detriment) was not the protected act as such but some feature of it which could properly be treated as separable, such as the manner in which the protected act was carried out. Underhill J continued that the distinction made was subtle but had to be drawn. In that particular case the Employment Appeal Tribunal found that features of the case including the falseness of the allegations, the fact that the Claimant was unable to accept that they were false, the fact that those features were the result of mental illness, and the risk of further similar

conduct as a result of that illness, were all properly and genuinely separable from the making of the complaint itself.

84. In the present case, the Tribunal found that all of the evidence pointed to the First Respondent's concern being not that the Claimant had made a complaint about a breach of the Equality Act but that she had made it to the Second Respondent rather than to themselves.

85. Mr McKetty submitted that the lack of a fair procedure could enable the Tribunal to infer that there had been victimisation. The Tribunal has already observed that there were features that might have caused concern had there been an unfair dismissal complaint. We did not, however, find that there had been unreasonable or unfair conduct in a way that could properly lead to an inference of victimisation or indeed discrimination of another form, whether or not it would be regarded as unfair in a different context. The Tribunal found it understandable that the First Respondent would not want to contact the employees of the Second Respondent given the nature of the business relationship between the two companies. This was the more so when the Claimant's complaint was not about something that had directly affected her or that she had even observed, but had taken place between employees of the Second Respondent, and in particular when the "victim" of the comments Mr Torongo had not raised any complaint.

86. It was also true that Ms Parker-Herman made some observations about the complaint which might be seen as critical in a way that went beyond the fact that the Claimant had made it to the Second Respondent. In the course of the investigatory meeting Ms Parker-Herman referred to the subject matter as "third party gossip" and pointed out that Mr Torongo did not want to take the matter any further. The Tribunal did not however see any evidence that this had been a significant factor in Ms Parker-Herman's decision (and nothing similar was said or written by Ms Wood). In any event, this point was not an indication that the making of the allegation itself was a significant influence on the decision to dismiss the Claimant or on the way in which the grievance was investigated.

87. For the following reasons, the Tribunal concluded that this was a case where the distinction between the doing of a protected act and the manner in which it was done was significant. We concluded that it was the manner in which the protected act was carried out and not the protected act itself that was a significant influence on the decision to dismiss the Claimant and to the extent arising, the decisions about how to investigate the grievance.

- (1) Each of the invitation to the disciplinary meeting (page 139); the letter giving the outcome of that meeting (page 141); and the appeal outcome letter (page 170) identified the fact that the Claimant had raised her grievance directly with the Second Respondent as being the relevant factor. None of those documents suggested that the making of the complaint itself was a cause for concern.

- (2) The First Respondent considered it sufficiently important that any complaints should be made to itself rather than to the client as to merit including this in the handbook (page 86).
- (3) The Tribunal considered that it made commercial sense that the First Respondent would not want grievances raised with clients. The facts of this case provide a good example as to why this should be. The Second Respondent was concerned to receive a complaint from a consultant supplied by the First Respondent which related to matters that she herself had not witnessed and which concerned interactions between employees of the Second Respondent. This, the Tribunal considered, was the sort of complaint that the First Respondent would wish to consider before making any decision about whether to raise it with the Second Respondent at all, because of the possibility that a direct approach might disturb the commercial relations between the two companies.

88. Mr McKetty made a submission that was related to the last point above, in that he contended that it was in the First Respondent's interests to "bury the allegation" by dismissing the Claimant. In fact it was too late to bury the allegation, if that is what the First Respondent wanted to do; it was already in the open because the Claimant had gone straight to the Second Respondent.

89. The complaint of victimisation was therefore unsuccessful, as the protected act itself was not a significant influence on the decision to dismiss the Claimant. It was the manner in which the protected act was done that was such an influence.

90. There remain the complaints of direct discrimination and harassment. These can be dealt with more briefly.

91. Section 13(1) of the Equality Act provides that:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

92. In the present case the protected characteristic is that of race and relates to Mr Torongo rather than to the Claimant herself. Two overlapping versions of the less favourable treatment relied on were given in the list of issues (paragraphs 2.3 and 2.8) but in essence, these were equivalent to the detriments relied on in relation to victimisation.

93. For substantially the reasons given in relation to causation in respect of victimisation, the Tribunal found that, so far as material, the reason why the First Respondent treated the Claimant as it did was because she had raised her grievance directly with the Second Respondent. It was not because of Mr Torongo's race.

94. Section 26 of the Equality Act makes provisions about harassment. It is not necessary to make findings about all of those, as the Tribunal has reached similar conclusions to the above on causation. The relevant provision is as follows:

- (1) *A person (A) harasses another (B) if-*
 - (a) *A engages in unwanted conduct related to a relevant protected characteristic.....*

95. The test of conduct being “related to” a relevant protected characteristic is different from, and is generally easier to satisfy than, the test of treatment being “because of” a protected characteristic. However, again for essentially the reasons already given, the First Respondent’s relevant conduct towards the Claimant (in the list of issues on this aspect, confined to the dismissal) was not related to the relevant protected characteristic of Mr Torongo’s race. That, the Tribunal found, was entirely incidental. The subject matter of the grievance and the circumstances surrounding it, were not the point so far as the dismissal was concerned. The dismissal related to the fact that the Claimant had raised a grievance directly with the Second Respondent.

96. It follows from the above that all of the complaints should be dismissed.

97. The Tribunal has set a provisional date of 23 January 2020 for a hearing on remedy. This hearing date will not be required for that purpose, and has been vacated.

Employment Judge Glennie

Dated: 15th Nov 2019

Judgment and Reasons sent to the parties on:

18/11/2019

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For the Tribunal Office